



Aubrey Dunn
COMMISSIONER

State of New Mexico
Commissioner of Public Lands

310 OLD SANTA FE TRAIL
P.O. BOX 1148
SANTA FE, NEW MEXICO 87504-1148

COMMISSIONER'S OFFICE

Phone (505) 827-5760
Fax (505) 827-5766
www.nmstatelands.org

TITLE: Threatened and Endangered Plant and Animal Species

POLICY REFERENCE: ADM-0105

ISSUE DATE: May 11, 2015

EFFECTIVE DATE: May 11, 2015

REVIEW/REVISED DATE: May 11, 2015

I. PURPOSE

Background – Various governmental entities regulate plants and animals listed as threatened or endangered within the context of their statutory authorities. Plant and animal species are listed at the state or federal level or both. Each designation (federal or state) carries specific prohibitions on 'take' which result in distinct regulatory impacts on land use within the range of each species. Further, 'take' is defined and interpreted differently across jurisdictional boundaries. The following policy guidance outlines the appropriate measures to be taken when evaluating potential rights-of-way, leases or renewals where threatened or endangered species are suspected or known to be present on state trust lands.

II. AUTHORITY

New Mexico Administrative Code

III. DEFINITIONS

IV. APPLICABILITY

This policy applies to all employees of the SLO whether classified or exempt, full-time or part-time, permanent, probationary or temporary, supervisory or non-supervisor.

V. SUMMARY OF POLICY AND PROCEDURES

Plants –

Listed by the State of New Mexico Only

Regulated by the Environment, Minerals and Natural Resources Department, Division of Forestry pursuant to 75-6-1 NMSA 1978 and accompanying rule 19.21.2 NMAC. Endangered species include those plant species that are listed as threatened or endangered under the provisions of the Endangered Species Act of 1973 as amended (ESA) as well as those that are deemed endangered by the state administrative code.

New Mexico Administrative Code specifically prohibits the taking of plant species designated as endangered under 19.21.2.9 NMAC. Pursuant to this rule, ‘taking’ means “***the removal, with the intent to possess, transport, export, sell, or offer for sale*** (emphasis added) any of the plants listed in 19.21.2.9 NMAC, from the places in the state of New Mexico where they naturally grow”.

Due diligence – **ADVISORY ONLY**

- Field Division shall notify the respective Division (Commercial; Surface; Oil, Gas & Mineral) regarding the potential or known presence of state-listed endangered plants found on affected state trust lands.
- If potential disturbance of plants may occur due to proposed lessee activities, the respective Division shall advise the lessee of the occurrence and attach applicable state law to the correspondence.

All Federally Listed

Regulated by the United States Department of Interior, Fish and Wildlife Service under the authority of the ESA and associated federal code – Title 16 USC Chapter 35 §1531–1544. Specifically, §9(a)(2) of the ESA states it is unlawful...to remove and reduce to possession any such species ***from areas under Federal jurisdiction*** (emphasis added); maliciously damage or destroy any such species on any such area; or remove, cut, dig up, or damage or destroy any such species on any other area in knowing violation of any law or regulation of any State or in the course of any violation of a State criminal trespass law; or violate any regulation pertaining to such species or to any threatened species of plants listed pursuant to section 4 or of the ESA.

Due diligence – **ADVISORY ONLY**

- The Field Division shall notify the respective Division (Commercial; Surface; Oil, Gas & Mineral) regarding the potential or known presence of ESA-listed threatened or endangered plants found on affected state trust lands.
- If potential disturbance of plants may occur due to proposed lessee activities, the respective Division shall advise the lessee of the occurrence and attach applicable state law to the correspondence.

Animals –

Listed by the State of New Mexico Only

Regulated by the New Mexico Department of Game and Fish pursuant to 17-2-37 through 17-2-46 NMSA 1978 and accompanying rules 19.33.2 through 19.33.6 NMAC. Rule mimics federal code and specifically defines ‘threatened’ as “any species or subspecies that is likely to become endangered within the foreseeable future throughout all or a significant portion of its range in New Mexico” and ‘endangered’ as “any species or subspecies whose prospects of survival or

recruitment in New Mexico are in jeopardy". Similarly, 'take' is broadly defined in statute as "***to harass, hunt, capture or kill any wildlife or attempt to do so***" (emphasis added).

17-2-41 NMSA 1978 states "it is unlawful for any person to take, possess, transport, export, process, sell or offer for sale or ship any species of wildlife found on any of the following lists:" (1) the state list of ***endangered*** (emphasis added) wildlife, or (2) ESA listed as threatened or endangered.

Due diligence – ADVISORY ONLY

- The Field Division shall notify the respective Division (Commercial; Surface; Oil, Gas & Mineral) regarding the potential or known presence of state-listed endangered wildlife found on affected state trust lands.
- If potential disturbance or death of individuals of the wildlife species may occur on state trust lands due to proposed lessee activities, the respective Division shall advise the lessee of the potential occurrence and attach applicable state law to the correspondence.

All Federally Listed

Regulated by the United States Department of Interior, Fish and Wildlife Service under the authority of the ESA and associated federal code – Title 16 USC Chapter 35 §1531–1544. Specifically, §9(a)(1) of the ESA states it is unlawful to ...take any such species within the United States...; or violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 4 of the ESA. Section 3(19) of the ESA defines take as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." Further, the USFWS defines "harm" to "include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering" in 50 C.F.R. §17.3. The Supreme Court has upheld this USFWS interpretation as a reasonable interpretation of the statute [Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687 (1995)].

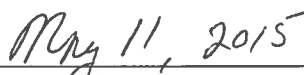
Due diligence – ADVISORY AND FURTHER REVIEW

- The Field Division shall notify the respective Division (Commercial; Surface; Oil, Gas & Mineral) regarding the potential or known presence of ESA-listed threatened or endangered wildlife or fishes found on affected state trust lands.
- If potential take of those species may occur due to proposed lessee activities, the respective Division shall forward the pending lease and related documentation to the Assistant Commissioner of that Division for further review and determination of an appropriate course of action.

APPROVAL:



Aubrey Dunn
Commissioner of Public Lands



Date